RECORD AND BRIEFS

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No. 16-466

In the Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,

Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, *et al.*,

Respondents.

On Writ of Certiorari to the California Supreme Court

BRIEF OF THE CALIFORNIA CONSTITUTION CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Interest of *Amicus Curiae* 1

Summary of Argument 1

Argument 6

I. The Original Understanding of Personal Jurisdiction and Due Process Amply Support Jurisdiction in this Case. 7

II. Litigation of National Mass Torts in the California Courts Does Not Violate Traditional Notions of Fairness and Substantial Justice. 12

A. Broadside Attacks on the Integrity of State Jurists Are Improper Bases for Cabining State Judicial Authority. 12

B. California Courts Are Fair Venues in Which to Litigate Mass Torts. 16

Conclusion 25

TABLE OF AUTHORITIES

Cases

Burnham v. Superior Ct. of Cal., 495 U.S. 604 (1990) 10

D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1851) 8

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 2, 7

Kearney v. Saloman Smith Barney, Inc., 137 P.3d 914 (Cal. 2006) 20

McCann v. Foster Wheeler LLC, 225 P.3d 516 (Cal. 2010) 15, 18

Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869) 9

Pennoyer v. Neff, 95 U.S. 714 (1878) 7, 8, 10

Picquet v. Swan, 19 F. Cas. 609 (CCD Mass. 1828) 8, 9

Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) 22

Republican Party of Minn. v. White, 536 U.S. 765 (2002) 15

Sullivan v. Oracle Corp., 254 P.3d 237 (Cal. 2011) 18

Washington v. Glucksberg, 521 U.S. 702 (1997) 16, 24, 25

Withrow v. Larkin, 421 U.S. 35 (1975) 15

Other Authorities

American Tort Reform Foundation, *Judicial Hellholes*, http://www.judicialhellholes.org (viewed April 7, 2017) 24

Executive Summary: Are Out of State Plaintiffs Clogging California Courts?, Civil Justice Association of California (2016), http://cjac.org/what/research/CJAC_Out_of_State_Plaintiffs_Exec_Summary.pdf (viewed April 7, 2017) 23

Michael H. Hoffheimer, *California's Territorial Turn in Choice of Law*, 67 RUTGERS U. L. REV. 167 (2015) 18, 19, 20

INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae the California Constitution Center is a non-partisan academic research institution at the University of California, Berkeley School of Law. It is the first and only center at any law school devoted exclusively to studying the constitution and high court of the state of California. Toward that end, the Center publishes scholarly articles and commentary, conducts conferences, and selectively participates as *amicus curiae* in cases raising significant constitutional issues that implicate or affect California constitutional law.

SUMMARY OF ARGUMENT

California's exercise of personal jurisdiction over Petitioner in this case is well within its constitutional authority. Petitioner's attempt to impose, under the guise of due process, a plaintiff- and claim-specific territorial causation requirement for personal jurisdiction is deeply flawed. Such a partial reversion to territorial causation requirements, while continuing to reject the sufficiency of territorial presence for personal jurisdiction, would stray further from the original understandings of jurisdiction and due process, convert limited due-process constraints into an invitation to engage in judicial policy making, and aban-

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the written blanket consent of all parties, on file with this Court.

don the respect and deference owed to the States and the political branches.

Where, as here, there is no dispute that the California courts have personal jurisdiction over Petitioner as to identical claims by numerous California plaintiffs and have personal jurisdiction over California co-defendant McKesson as to identical claims by *all* plaintiffs, the debate whether non-resident plaintiffs already properly before the courts can *also* join their identical claims against Petitioner is a question of public policy, not constitutional law.

1. Demanding territorial causation for each plaintiff and claim as a necessary component of personal jurisdiction over a defendant is contrary to the original understandings of both personal jurisdiction and due process. As understood when the Due Process Clauses of the Fifth and Fourteenth Amendments were adopted, a court's jurisdiction over persons turned on physical presence in the territory of the relevant sovereign. Even absent personal physical presence, jurisdiction still existed where a person had assets within the relevant territory, at least to the extent of collecting upon such assets. Companies likewise were subject to such territorial jurisdiction based upon the presence of their agents or property within the relevant geography.

While this Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), shifted away from the formalistic original understanding of personal jurisdiction, it struck a balance with a more flexible approach that contracted general jurisdiction while expanding specific jurisdiction. Petitioner's attempt to abandon that balance, imposing formalistic and non-

traditional territorial limits on specific jurisdiction while continuing to eschew traditional territorial anchors for general jurisdiction, undermines the logic of *International Shoe* and moves further away from the original understanding of both personal jurisdiction and due process. Such an a-textual and counter-historical evolution of the Due Process Clause should not be endorsed by this Court.

2.a. The scattershot challenges by Petitioner and its *amici* to the fairness of joining non-resident plaintiffs in mass-tort actions are contrary to the limited scope of due-process claims generally and invite this Court to resolve a political tug-of-war beyond its proper purview. Turning primarily on complaints about forum shopping and the supposed bias of the courts selected by mass-tort plaintiffs, such arguments only thinly explore a hotly debated public-policy issue and do not remotely suggest the type of extreme unfairness that would rise to the level of a constitutional due process violation.

Forum-shopping objections, for example, are particularly suspect given that nationwide companies likewise forum shop in choosing where to incorporate or locate their principal places of business. While a variety of factors influence such locational choices, selecting and channeling the fora available to those suing the company, and especially the fora available for mass tort and other collective suits, is certainly a significant consideration. Additionally, while companies cannot guarantee that all cases will be brought in their favored States – plaintiffs can always sue in their own State of residence -- companies (and Petitioner here) also seek to ensure that any injured con-

sumers unwilling to sue in the company-selected fora will be dispersed and deprived of the financial and practical efficiencies of joining suit with others similarly injured. In short, to the extent defendants cannot impose their own forum-shopping preferences, they will settle for forum *splitting* instead.

The related accusation that courts may be engaged in "forum selling" is offensive, unsupported, and, if true, would likely cut the other way. In any event, this Court should not lightly countenance such aspersions on the integrity of state court jurists.

The point here is not necessarily to defend or disparage both sides' efforts to have some say over the available fora or the number of plaintiffs able to join a collective suit, but rather to highlight that these are *competing* positions and deal with a balance of interests between businesses and consumers. As such, they are best resolved by those empowered with policy-making discretion – be it state legislatures and state courts, or Congress exercising its authority under the Commerce Clause, the Full Faith and Credit Clause, or its power to expand federal court jurisdiction if it questions the fairness of state court adjudications. But in all instances, absent extreme examples of abuse in individual cases, these are political questions, not due-process concerns demanding inflexible constitutional intervention by this Court.

To the extent there are palpable examples of unfairness in specific cases, those are best addressed in as-applied challenges to the exercise of jurisdiction or to the supposedly unfair procedures being applied. As-applied challenges would have the benefit of a fully developed record, of the exhaustion of alternative

remedies to correct or mitigate any alleged unfairness, and are more in keeping with this Court's practice regarding broad constitutional challenges to laws covering a diversity of situations. As Respondents have noted, Resp. Br. at 11, no such as-applied challenge can be sustained here given Petitioner's concession below regarding the fairness and reasonableness of jurisdiction in this case.

b. The current attacks by Petitioner and its *amici* on California as a fair forum for mass torts are misguided and incorrect.

First, on a broad level, the California courts already have jurisdiction over identical claims against Petitioner by California plaintiffs and over identical claims against co-defendant McKesson by all plaintiffs. Petitioner does not contend that the behavior and rules of the California courts violate due process regarding any of those plaintiffs and claims. Indeed, any supposed bias in the California system presumably would skew more in favor of *resident* plaintiffs hence, *a fortiori*, if there is no actionable unfairness as to claims by them, there can be no actionable unfairness in favor of non-resident plaintiffs.

Second, at a concrete level, California courts are more than sufficiently fair to business defendants. On choice-of-law issues, the California courts are quite attentive to the policy interests of other States, particularly pro-business interests of States seeking to attract companies and economic activity. The suggestions by some *amici* to the contrary are mistaken and, at best, out of date.

Finally, objections to the practical difficulties of mass-tort litigation involving multi-state parties are

hardly unique to California, apply with even greater force to Petitioner's "home" fora, and, to the extent they pose a meaningful problem in a given case, can be solved or mitigated by existing remedies or doctrines. None of those alleged difficulties, however, come even close to the level of a due-process violation. They are merely the inconveniences of having to litigate the consequences of actions that span a wide geography and may be subject to the substantive jurisdiction of multiple sovereigns. To the extent such multi-jurisdiction difficulties should be addressed systematically, it should be done by Congress or through multi-state coordination, not by this Court.

ARGUMENT

Petitioner and its *amici* caricature this case and the surrounding issues as a clash between "forum shopping" plaintiffs' lawyers and innocent companies abused by unfair lawsuits in distant and alien venues. That is a common and misleading trope used to mask an unremarkable policy debate on how to balance the competing interests of consumers and businesses. The Constitution affords the States and the federal government broad latitude in striking the appropriate balance of those interests. This Court has little role in that political debate, absent such a severe departure from "traditional" notions of fairness that this Court is obliged to cabin the policy choices of the States or of Congress. Nothing in this case, or in the California Supreme Court's finding of personal jurisdiction, even comes close to such boundaries, whether as a matter of an original understanding of the allowable breadth of personal jurisdiction or as a

matter of this Court's usual due-process jurisprudence.

I. The Original Understanding of Personal Jurisdiction and Due Process Amply Support Jurisdiction in this Case.

Amici agree with Respondents that the jurisdictional rule Petitioner seeks is contrary to the original understandings of personal jurisdiction, due process, and the proper role of state courts in adjudicating disputes throughout the country. *See* Resp. Br. at 33-35. While this Court's jurisprudence has moved away from that understanding – simultaneously expanding and contracting personal jurisdiction by reducing the role of territorial "presence" – Petitioner seeks to disrupt the balance struck in *International Shoe* and contract personal jurisdiction still further. If the Court is to abandon the flexible approach of *International Shoe* in favor of a renewed emphasis on territorialism, then it should do so in a direction that moves the jurisprudence *closer* to the original understanding on such matters, not further away.

Regarding whether allowing California to assert jurisdiction in this case offends "traditional notions of fair play and substantial justice," *International Shoe*, 326 U.S. at 316 (internal quotation marks omitted), it is worth noting that as a "traditional" matter the exercise of personal jurisdiction here is obvious and uncontroversial. At the time of the Founding, the jurisdiction of a court over persons was uniformly understood to be based on physical presence within the territory and by service of process therein. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878) (discussing the "well-

established principles of public law respecting the jurisdiction of an independent State over persons and property," which establish that "except as restrained and limited by [the Constitution], * * * every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory"); *id.* at 724 (noting that the adjudicatory power of States over persons and property in their territory is "not new," citing Justice Story in *Piquet v. Swan*); *Picquet v. Swan*, 19 F. Cas. 609, 612 (C.C.D. Mass. 1828) (Story, Circuit Justice) (discussing common-law and general jurisprudence regarding the authority of a State such that "Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced, on such process, against him.").

Indeed, the notion that service of process within the territory covered by a court was sufficient to confer personal jurisdiction derived from pre-existing principles of international law. *Pennoyer*, 95 U.S. at 730 (" 'The international law,' said the court, 'as it existed among the States in 1790, was that a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, when the defendant had not been served with process or voluntarily made defence.' ") (quoting *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 176 (1851)).

Under "traditional" and original understandings of state-court jurisdiction over persons and property, the California courts have valid personal jurisdiction over Petitioner because Petitioner is "present" in California, via numerous employees, agents, and consid-

erable property. Indeed, because a corporation's existence and hence presence is a creature of state law to begin with, States traditionally could condition a corporation's doing business in the State on appointing an agent for the service of process. *See Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 181 (1869) ("Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest."). Petitioner, of course, has an agent for accepting process in California. Resp. Br. at 5.

Even were corporate presence in doubt here, California could easily establish jurisdiction to enforce any judgment in this case at least to the extent of Petitioner's property within the State. *Picquet*, 19 F. Cas. at 612 ("Where [a party] is not within such territory, and is not personally subject to its laws, if on account of his supposed or actual property being within the territory, process by the local laws may by attachment go to compel his appearance, and for his default to appear, judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property").

Such traditional views likewise extend to any limits imposed by the Due Process Clause. As *Pennoyer*

noted, due process merely provides that proceedings to determine the "personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law." 95 U.S. at 733. But in the context of personal jurisdiction, all that is required is "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights," such that if the proceeding "involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance." *Id.*

That mere presence alone is a sufficient basis for personal jurisdiction under an original understanding of the Due Process Clause can also be seen in the rules concerning jurisdiction over natural persons. In *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), this Court held that the California courts had general personal jurisdiction over an individual personally served in the State. Speaking for a plurality of the Court, Justice Scalia wrote that "[a]mong the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State. * * * [That] understanding was shared by American courts at the crucial time for present purposes: 1868, when the Fourteenth Amendment was adopted." *Id.* at 611.

Indeed, having conceded personal jurisdiction as to the claims brought by California residents, there is no question that the California Courts have adjudicatory power over the company. From a traditional

perspective, therefore, there is no unfairness in California's current exercise of personal jurisdiction over Petitioner.

To be sure, *International Shoe* changed the traditional approach and substituted a more flexible and less territorial approach to personal jurisdiction as applied to corporate defendants. That approach simultaneously contracted general jurisdiction yet created an expanded specific jurisdiction, making territorial presence insufficient for the former and no longer necessary for the latter. Resp. Br. at 16.

What Petitioner seeks now is to revive a territorial requirement for specific jurisdiction, arguing that central causative events for each claim and plaintiff must have occurred within California in order for specific personal jurisdiction to exist. Pet. Br. at 11, 16-17; *Cf.* Brief of *Amicus Curiae* GlaxoSmithKline LLC in Support of Petitioner ("GSK *Amicus* Br.") at 26-29 (Mar. 8, 2017) (insisting on a territorial proximate-cause test, not merely a but-for test).

But there is no justification for only partially disrupting the balance struck in *International Shoe*. If this Court were to revive territorialism as the touchstone of personal jurisdiction, then it should go all the way in restoring an original understanding of such matters, reviving physical presence jurisdiction and *in rem* or *quasi-in-rem* jurisdiction. Certainly, this Court could rely on precedent and stick with the flexible compromise struck in *International Shoe*, and the broad scope of specific jurisdiction reflected therein. But if territorialism is to be revived, this Court should take as its guide the historical and original views on jurisdiction and due process, rather than

malleable and changeable assertions of abstract "fairness" that boil down to little more than policy preferences in cases such as this one.

If a change is to be made, better it be done in a manner that brings us *closer* to an original understanding of the constitutional issues involved, rather than further away. Such an approach would have the virtue of cabining this Court's own exercise of policy-making power vis-à-vis the States and Congress, thereby supporting a proper allocation of authority under Our Federalism.

II. Litigation of National Mass Torts in the California Courts Does Not Violate Traditional Notions of Fairness and Substantial Justice.

Various of Petitioner's *amici* attempt to justify more stringent constitutional limits on personal jurisdiction by attacking the integrity and fairness of state courts generally and California courts specifically. Both the general and specific attacks lack merit and certainly do not rise to the level of a constitutional due-process objection.

A. Broadside Attacks on the Integrity of State Jurists Are Improper Bases for Cabining State Judicial Authority.

Broad complaints about forum shopping, the nefarious motives of plaintiffs' lawyers, and the supposedly self-serving behavior of state-court judges are both misguided and inaccurate.

Although it is fashionable to attack the bogeymen of "forum-shopping plaintiffs' lawyers," it is little

more than a rhetorical diversion to mask a more meaningful policy conflict between the rights and interests of consumers and businesses. Indeed, corporate counsel and the defense bar likewise "shop" for what they perceive to be favorable fora and try to use forum-*splitting* as a means to leverage their financial and litigation advantages to reduce the economic viability of fragmented suits by dispersed consumers.

That businesses forum shop no less than plaintiffs seems obvious but is often overlooked. National companies get to choose their State of incorporation and principal place of business, and do so with an eye towards favorable procedures and substantive laws. Petitioner effectively admits as much when it argues that predictability regarding personal jurisdiction is important to businesses that wish to anticipate what laws might apply to their operations and make business decisions accordingly. Pet. Br. at 29-30.

Were Petitioner to prevail in this case, individuals or small groups could, of course, still sue in their home States, but it would only be in Petitioner's chosen fora that a meaningful mass-tort action could be brought. Under Petitioner's approach, therefore, injured consumers here and elsewhere would face a Hobson's choice of acceding to a company's preferred fora or allowing that company to successfully divide and conquer the numerous victims of a mass tort through a multiplicity of geographically diffuse suits. Dividing plaintiffs and claims into as small groups as possible increases the per-claim cost of suit and raises an economic barrier to the filing and full litigation of such suits. Again, Petitioner effectively admitted as much in the courts below, arguing that if the

claims in this case were split up many might not be brought. *See* Resp. Br. at 8 (discussing Petitioner's argument below).

The related suggestion by one of Petitioner's *amici* that the California Supreme Court adopted its view of personal jurisdiction in order to "attract[] out-of-state mass tort plaintiffs and their forum-shopping counsel" is implausible and offensive. Brief of DRI-The Voice of the Defense Bar as *Amicus Curiae* in Support of Petitioner ("DRI *Amicus* Br."), at 4, 8-9 (Mar. 7, 2017). The State certainly has little interest in adding further cases to its court dockets and nothing to gain from awards to non-residents. *Cf.* Pet. App. 36a, 41a-42a (noting Petitioner's contention that this case will burden the California courts); DRI *Amicus* Br. 8 (discussing burden on California courts).

Furthermore, aside from the offensiveness of sweeping attacks on the integrity of jurists who supposedly "sell" their courts for prestige or the economic interest of the local bar, it is hard to imagine why any such temptations would be uni-directional. Under DRI's dim view of jurists, presumably being pro-defendant would attract businesses to incorporate or have primary facilities in such jurisdictions. And favoring the defense would presumably pave the road for future employment. It is far from clear why the notion of jurists incapable of being fair would skew in favor of plaintiffs rather than defendants. [2]

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[2] While attacking the neutrality of state courts is a dubious exercise, there is no question that state legislatures may, as a policy matter, enact laws and procedures that balance competing interests more or less in favor of businesses or consumers, as a reflection of their public policy. If forum shopping leads to fo-

Amicus here does not credit such wholesale attacks on the integrity of state courts, and neither should this Court. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (there is a "presumption of honesty and integrity in those serving as adjudicators."); *Republican Party of Minn. v. White*, 536 U.S. 765, 796 (2002) (Kennedy, J., concurring) ("We should not, even by inadvertence, 'impute to judges a lack of firmness, wisdom, or honor' ") (citation omitted). If there is a concrete instance of a judge acting in that manner, that is an occasion for an as-applied challenge, a motion for recusal, or the myriad other remedies for alleged judicial impropriety. It is not a reason to treat state courts in general as untrustworthy and to impose heightened and a-textual constitutional constraints on their jurisdiction.

Amicus is not so naïve as to think that various attempts to gain advantage are somehow absent from or contrary to our adversarial system. But it likewise is not so obtuse as to miss the irony in the defense

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rum "selling," corporations would seem to be far more attractive customers to pursue. Companies locating their businesses in a State pay considerable taxes, provide employment, and add far more to the local economy that the occasional group of plaintiffs' lawyers bringing lawsuits involving some percentage of nonresidents. *Cf. McCann v. Foster Wheeler LLC*, 225 P.3d 516, 530 (Cal. 2010) (noting that states can adopt "a rule of law limiting liability for commercial activity conducted within the state in order to provide what the state perceives is fair treatment to, and an appropriate incentive for, business enterprises," and has an "legitimate interest in attracting out-of-state companies to do business within the state, both to obtain tax and other revenue that such businesses may generate for the state, and to advance the opportunity of state residents to obtain employment and the products and services offered by out-of-state companies").

bar complaining about forum shopping and allowing plaintiffs to benefit from economies of scale. At the end of the day, the tug of war between making it easier to bring valid claims shared by large groups of people, and making it more difficult to use collective action to exert settlement pressure on defendants is a quintessential policy issue best resolved based on data and political considerations. In short, based on factors better suited to evaluation by the political branches rather than this Court.

This Court should be quite hesitant in imposing constitutional limits on state-court assertions of jurisdiction. Determining the limits imposed by historic notions of fundamental fairness should be applied with the same reticence used in determining the scope of other due process rights. *Cf. Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (Court must " 'exercise the utmost care whenever we are asked to break new ground in this field,' * * * lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court") (citation omitted).

B. California Courts Are Fair Venues in Which to Litigate Mass Torts.

As for the specific complaints by Petitioner and its *amici* about the California courts, they lack both theoretical and substantive support.

At a theoretical level, many of the complaints amount to little more than a charge that "we lose cases in California," with no regard to whether such losses are deserved or undeserved. Surely a complaint of unfairness presupposes knowledge of what

the "right" answer ought to have been. Simply describing outcomes without demonstrating they were in error makes no normative point at all. Any supposed differential pattern of success or failure between state courts simply begs the question of which one deviated from the theoretically "right" pattern of outcomes. Perhaps it is Delaware, or whatever other States defendants seem to favor, that are the biased ones. Or perhaps there is a broad range of policy balances that can be struck by state legislatures and state courts, all of which are fundamentally "fair" in the constitutional sense, but which reflect different policy values, preferences, and balances. Merely complaining that the system is "unfair" because a defendant lost is the type of argument best left in the schoolyard (or made in the statehouse), not foisted upon this Court. And given that Petitioner makes no claim of unconstitutional unfairness in having to litigate against California-resident plaintiffs, who presumably would have equal or greater favor in the California courts, there is no credible claim that the California courts will unconstitutionally favor the non-resident plaintiffs who have joined in the suit.

As for the practical complaints regarding California law or the difficulties of mass-tort litigation, those again miss the mark.

For example, Petitioner and its *amici* complain about California choice-of-law rules, suggesting they complicate mass tort litigation and are biased against defendants. Pet. Br. at 32; DRI *Amicus* Br. at 12-13; GSK *Amicus* Br. at 20. But choice-of-law issues have little to do with personal jurisdiction and would arise in identical fashion for mass-tort suits brought

against Petitioner or any other defendant in their "home" fora.

Furthermore, the California court system is exceedingly even-handed regarding choice of law, particularly in its consideration of the interests of other jurisdictions. For example, California courts are increasingly more likely to apply the substantive law of the outside jurisdiction than they are to impose California's own substantive law where the issue in dispute involves conduct occurring elsewhere. *See, e.g.*, *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 530 (Cal. 2010) (noting interest of sister states in applying a "rule of law limiting liability for commercial activity conducted within the state in order to provide what the state perceives is fair treatment to, and an appropriate incentive for, business enterprises"); *Sullivan v. Oracle Corp.*, 254 P.3d 237, 249 (Cal. 2011) (rejecting application of California law to claims by nonresidents for work performed outside the state for a California defendant). Indeed, commentators have noted that recent California cases have moved to a distinctly territorial approach to choice of law and that California courts are far more likely to apply foreign law where the operative events occurred outside the State. *See, e.g.*, Michael H. Hoffheimer, *California's Territorial Turn in Choice of Law*, 67 RUTGERS U. L. REV. 167, 169 (2015) ("In 2010 and 2011, the Supreme Court of California unanimously decided two conflicts cases. In holding that foreign law applied in both cases, the court relied heavily on the fact that events giving rise to the claims occurred outside California's territory.") (footnotes omitted; citing *McCann* and *Sullivan*).

Amicus GSK's complaints to the contrary, at 20, rely on out-of-date cases and are not reflective of the current state of California law. Indeed, if anything, California courts are being especially solicitous to the pro-business policies of its sister States. Even defense lawyers have acknowledged that the *McCann* and *Sullivan* decisions reflect a pro-business turn by an increasingly conservative California Supreme Court. *See* Hoffheimer, 67 RUTGERS U. L. REV. at 169-70 n. 15 (citing commentary by defense lawyers describing those cases as " 'critical opinions that together provide a framework that can help national companies with California litigation to apply tort reform provisions from a more business-friendly state like Florida, Texas, or Ohio, in which the injury on trial occurred. This doctrine has the potential to dramatically reduce the scope of damages and liability when a claim tried in California arises from an injury that took place in such a state.' ") (citation omitted). Another defense-bar commentator concluded that the *McCann* decision should " 'limit forum shopping and prevent California from becoming a litigation magnet for plaintiffs who seek to sue for injuries that might otherwise be time[]barred.' " *Id.* (citation omitted).

Reviewing the recent California Supreme Court decisions, as well as subsequent decisions applying them, Professor Hoffheimer has concluded that "California courts since 2000 have employed territorial principles to identify state interests in a way that signals a decisive turn away from the state's longstanding commitment to the comparative impairment methodology." *Id.* at 170-71. "[A]ll the recent California cases present disputes between par-

ties from different states; accordingly, the application of a territorial rule can be seen as expressing a de facto adoption of the approach that prevails in some other jurisdictions of applying the law of the place of the wrong as the default rule in disputes between persons who do not share a common domicile." *Id.* at 220-21.

California's more recent "judicial expressions of sympathy for 'business friendly' foreign laws in a pattern of decisions favoring corporate defendants," *id.* (footnote omitted), open it to criticism that is precisely opposite the criticism leveled by Petitioner and its *amici*. Professor Hoffheimer acknowledges the possibility that California has now swung around to a pro-business, rather than pro-plaintiff, perspective:

> The territorial turn may reflect a shifting attitude towards the content of the laws in conflict and a response to the perception that the judicial environment in California is hostile to business.[] The single factor that appears most strongly correlated to the outcome of decisions since 2000 is whether the chosen law favors commercial defendants.[] * * * Selecting law that is good for business may be good for business, but it threatens to convert California choice of law into a form of better law that leaves the court's rationalizations open to a charge of systematic bias in favor of a class of parties.

Id. at 222-23 (footnotes omitted); *see also id.* at 222 n. 254 ("with the exception of the prospective application of *Kearney v. Saloman Smith Barney, Inc.*, 137 P.3d 914 (Cal. 2006), apparently no California deci-

sions have rejected defenses when the conduct occurred in a foreign state and that place's law provided a defense. In every case since 2000 where it has arguably departed from the traditional approach, it has done so by applying business-friendly law that favored defendants.").

Where each side contends that the courts are favoring the other, it is a safe bet that they are doing something right, and more than likely are not infected by systematic bias.

As for various of the other complaints regarding the fairness of litigating national mass-tort suits, none poses any meaningful due-process problem. Any difficulty in obtaining live trial testimony from out-of-state witnesses, GSK *Amicus* Br. at 16-17, is an inevitable issue in any mass-tort litigation and is hardly unique to California. It would be equally true in Petitioner's home fora or other favored consolidated venue and has nothing to do with personal jurisdiction issues. Indeed, all parties agree that mass-tort plaintiffs, regardless of their residency, could sue a defendant in its State of incorporation or where it has a principal place of business. Yet those venues have no more ability to compel live trial testimony of out-of-state treating physicians than does California.[3]

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[3] The only thing that would cure this issue would be to require plaintiffs to sue in their home State. But that, of course, would make it similarly difficult to compel trial testimony of various witnesses with knowledge of *defendant's* conduct, might still raise choice-of-law issues if defendant's underlying decisions or manufacturing occurred at its corporate headquarters or elsewhere, and would guarantee the diffusion of claims across 50 venues, thus making them less economically viable and subject to pressure to settle on the cheap.

That such practical concerns do not track personal jurisdiction over the *defendant* demonstrates that they are a separate problem from the issues in this case. GSK thus is mixing apples and oranges – convenience issues have nothing to do with jurisdiction unless they rise to the level of fundamental unfairness that cannot be cured by other means, such as existing rules on *forum non conveniens*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); Pet. App. 38a n. 5, or by alternative procedural remedies.[4] If the response to such problems in any individual case is patently unfair to a defendant, then it constitutes its own separate due-process problem, not a problem with personal jurisdiction.

Amicus GSK makes the particularly dubious claim, at 4, that "aggregating large numbers of plaintiffs makes it difficult if not impossible for defendants to defend each claim on its merits." That claim gets it precisely backwards. Aggregating plaintiffs and then dealing collectively with the common legal parts of their claims – was the product defective, what did defendant know and when did it know it, did it market its product in a misleading manner – leaves all the more time to address the individual aspects of each plaintiff's claims. If such suits were brought either

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[4] GSK's objection, at 19 n. 9, that *forum non conveniens* is inadequate because it is discretionary misses the point. Due process only provides a minimum guarantee of fundamental fairness, not a defendant's most preferred form of process. *Forum non conveniens should* be discretionary given that balancing relative convenience is not a science and admits to a wide range of acceptable outcomes. It is only where such discretion is abused that it might rise to the level of fundamental unfairness implicating a due-process problem.

individually or collectively across 50 state fora, GSK and other defendants would spend considerable time re-litigating identical common issues and just as much time per plaintiff litigating individual issues. The aggregate amount of time GSK would spend would be far higher in total, ad it would be far more difficult and expensive to devote time to individual issues.

GSK's further complaint, at 13-14, about the number of non-resident plaintiffs suing in California is hyperbole and relies on highly questionable data. Neither GSK nor the source it cites describes how many of the *defendants* are "at home" in California, and hence the residence of plaintiffs alone is meaningless. In this case, for example, defendant McKesson is being sued by numerous non-resident plaintiffs yet is it frivolous to claim that such fact somehow reflects a problem with personal jurisdiction.[5]

Amicus DRI's denigration of the California court system as a "Judicial Hellhole[]," DRI *Amicus* Br. at 11, likewise lacks substance. Suffice it to say that such *ad hominem* attacks on California and other state courts add nothing to the debate and, ironically

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[5] The source cited by GSK's claim is a supposed study of California suits, but links only to the Executive Summary, with no apparent means to access the complete report or its methodology. *See Executive Summary: Are Out of State Plaintiffs Clogging California Courts?*, Civil Justice Association of California (2016), http://cjac.org/what/research/CJAC_Out_of_State_Plaintiffs_Exec_Summary.pdf (viewed April 7, 2017). Such questionable data is not a credible basis for decision-making by anybody, much less a proper basis for this Court to weigh in on policy issues.

do not even distinguish California from Petitioner's principal places of business – New York and New Jersey – which are likewise disparaged by DRI's intemperate source. *See* American Tort Reform Foundation, *Judicial Hellholes*, http://www.judicialhellholes.org (viewed April 7, 2017) (ranking New York City and New Jersey in the top five, along with California).

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In the end, none of the complaints by Petitioner or its *amici* reflect anything approaching fundamental unfairness. The Due Process Clause is a narrow constitutional constraint on state authority that, like other due-process constraints, should be applied sparingly and humbly, without reference to the debatable policy concerns raised by Petitioner and its *amici*. Such concerns over how best to deal with nation-wide mass torts are properly addressed to the States themselves or, if necessary, to Congress to establish uniform national rules covering the procedures for dealing with injuries arising from nationwide commerce. Having this Court constitutionalize all the nuances of the clash between businesses and consumers would, "to a great extent, place the matter outside the arena of public debate and legislative action." *Glucksberg*, 521 U.S. at 720. As with many issues, there is an ongoing debate and experimentation regarding how best to balance the conflicting interests of businesses and consumers when it comes to mass torts. It is more than appropriate to allow that debate and experimentation "to continue, as it should in a democratic society." *Id.* at 735.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the California Supreme Court.

Respectfully submitted,

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